In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-820

MICHAEL J. FINK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that hearsay evidence was improperly adduced by the government to rebut his defense of entrapment by showing his predisposition to commit the offense.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Geders were convicted of conspiracy to import and illegal importation of marihuana into the United States, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 371, and possession of such marihuana, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a term of two years' imprisonment, which was suspended, and he was placed on probation for two years. The court of appeals affirmed (Pet. App.).

The evidence showed that petitioner, co-defendant Geders, and co-defendant Kilgore entered into an agreement to smuggle marihuana into the United States. Geders agreed to provide a South American contact, petitioner agreed to obtain financial backing for the trip and the purchase (Tr. 59), and Kilgore agreed to arrange for a pilot. Each carried out his part of the arrangement, bringing several additional conspirators into the plan (Pet. App. A-6—A-7). In November 1972, Geders and the pilot flew in a rented plane to Colombia, South America, where they picked up a load of marihuana. They then returned, via the Bahamas, to Florida. Federal agents subsequently seized the marihuana and arrested petitioner and Geders (Pet. App. A-7—A-8).

At trial, petitioner and Geders claimed that they had been entrapped because the pilot furnished the government with advance information regarding the scheme (Pet. App. A-8, A-9—A-10).

In rebutting the claim of entrapment, the government sought to prove predisposition. A federal narcotics agent testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, sheriff's office and thereby ascertained that co-defendant Geders had a reputation in his community for drug smuggling and distributing. When the defense asked to see the files upon which the witness' testimony was based or to be given reference to the specific events contained therein, it was refused by the court, which admonished the defense that it would be contrary to the rules of evidence for the prosecution to admit evidence of the specific acts of Geders that gave rise to his unsavory reputation (Pet. App. A-10).

Petitioner asserts that reputation evidence is inadmissible hearsay under the cases which he cites. Reputation evidence is, however, admissible as part of the "appropriate and searching inquiry" into the predisposition of the accused that is authorized by *Sorrells* v. *United States*, 287 U.S. 435, 451, and *Sherman* v. *United States*, 356 U.S. 369, 372-373 (Pet. App. A-10—A-11). As the court of appeals stated "'once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents [citations omitted]'" (Pet. App. A-11). Moreover, the court's refusal to permit the defense to question the witness about the specific events or activities that gave rise to his adverse public image was well within the court's discretion. Character reputation is established by what one has heard in the community about the person in question, rather than by actual events or activities. See *Michelson* v. *United States*, 335 U.S. 469; *Stewart* v. *United States*, 104 F.2d 234 (C.A.D.C.).

There is no conflict among the circuits on this issue. The cases on which petitioner relies are inapplicable, since they deal with evidence of *specific* past acts offered to rebut an entrapment defense, rather than with evidence of general reputation, as in the instant case.

In any event, any error in introducing such evidence was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18. There was ample evidence that, despite the pilot's help in perpetrating the scheme, petitioner was fully predisposed to carry it out even without such aid. *United States* v. *Russell*, 411 U.S. 423, 435. The scheme commenced in 1972, when petitioner agreed to make financial arrangements for the purchase and transporta-

tion of the marihuana (Tr. 56-59). Prior to finding a pilot for the scheme, petitioner arranged a meeting of financial backers. Discussion at the meeting centered upon the cost of acquiring the marihuana and the eventual profit from distributing it (Tr. 61). Petitioner thereafter hired the pilot. As one witness testified, however, "the trip was going to go off, whether there was Mr. Butler [the pilot] or not. * * * [T]hey were going to get a pilot, and if it was not Mr. Butler then they were going to have to * * * get one from someplace else" (Tr. 308).

Moreover, the evidence admitted with regard to Geder's predisposition had no bearing upon the jury's finding as to *petitioner's* predisposition. The relevant inquiry for appraising an entrapment defense is personal, depending upon whether the government "actually implants the criminal design in the *mind of the defendant* * * *." *United States* v. *Russell, supra,* 411 U.S. at 436 (emphasis supplied).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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